

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROGER PLANK,

No. C 08-3310 TEH (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS; DENYING  
CERTIFICATE OF APPEALABILITY

BEN CURRY, Warden,

Respondent.

\_\_\_\_\_ /

Pro se Petitioner Robert Plank, a state prisoner incarcerated at the Correctional Training Facility in Soledad, California, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging the California Board of Prison Hearings' ("BPH") August 9, 2006 decision denying him parole. Specifically, Petitioner claims the decision does not comport with due process because it is not supported by some evidence demonstrating that he poses a current threat to public safety. Doc. ## 1 & 9.

The United States Supreme Court recently made clear that in the context of a federal habeas challenge to the denial of parole, a prisoner subject to a parole statute similar to

1 California's receives adequate process when BPH allows him an  
2 opportunity to be heard and provides him with a statement of the  
3 reasons why parole was denied. Swarthout v. Cooke, No. 10-333, slip  
4 op. at 4-5 (U.S. Jan. 24, 2011) (per curiam). Here, the record  
5 shows Petitioner received at least this amount of process. The  
6 Constitution does not require more. Id. at 5.

7         The Court also made clear that whether BPH's decision was  
8 supported by some evidence of current dangerousness is irrelevant in  
9 federal habeas: "it is no federal concern . . . whether  
10 California's 'some evidence' rule of judicial review (a procedure  
11 beyond what the Constitution demands) was correctly applied."  
12 Swarthout v. Cooke, slip op. at 6. Accordingly, the instant federal  
13 Petition for a Writ of Habeas corpus is DENIED.

14         Further, a Certificate of Appealability is DENIED. See  
15 Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner  
16 has not made "a substantial showing of the denial of a  
17 constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner  
18 demonstrated that "reasonable jurists would find the district  
19 court's assessment of the constitutional claims debatable or wrong."  
20 Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not  
21 appeal the denial of a Certificate of Appealability in this Court  
22 but may seek a certificate from the Court of Appeals under Rule 22  
23 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the  
24 Rules Governing Section 2254 Cases.

25 //

26 //

1       The Clerk shall terminate any pending motions as moot, enter  
2 judgment in favor of Respondent and close the file.

3  
4               IT IS SO ORDERED.

5 Dated   02/02/2011



6               THELTON E. HENDERSON  
7 United States District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

26 G:\PRO-SE\TEH\HC.08\Plank-08-3310-bph-deny-post cooke.wpd  
27  
28